YAP JACK KEET

v.

KETUA POLIS NEGARA & ANOR

HIGH COURT MALAYA, IPOH
CLEMENT SKINNER JC
[CIVIL SUIT NO: 21-10-96]
30 MARCH 2000

ADMINISTRATIVE LAW: *Public servants - Dismissal of police inspector - Right to be heard - Extent of - Public Officers (Conduct and Discipline) General Orders 1980 - Refusal of such rights - Whether justified in circumstances*

ADMINISTRATIVE LAW: *Rules of natural justice - Dismissal of plaintiff/police inspector as a result of disciplinary action taken against him - Power to dismiss - Whether exclusively within discretion of 1st defendant/Inspector General of Police - Whether wrongfully abdicated - Punishment of dismissal - Whether plaintiff to be accorded right to be heard in mitigation before punishment imposed*

ADMINISTRATIVE LAW: *Rules of natural justice - Right to be heard - Dismissal of plaintiff/police inspector as a result of disciplinary action taken against him - Extraneous matters considered but not communicated to plaintiff - Whether tantamount to fundamental breach of such right - General Order 23 of Public Officers (Conduct and Discipline) General Orders 1980 and Art 135(2) of Federal Constitution*

The plaintiff was an inspector in the Royal Malaysian Police. The plaintiff was issued with a show cause letter dated 7 January by the Penolong Ketua Urusetia KPN (Tatatertib) ('DW1'), made on behalf of the Inspector-General of Police ('the 1st defendant'). It contained five charges against him, the first three related to his alleged involvement with one Khor, who was reputedly an illegal four-digit lottery operator. As to the fourth and fifth charge, the plaintiff was alleged to have failed to make entries in his police diary of his movements on a certain date and also failed to submit his diary for inspection between January to May 1992 respectively. The plaintiff was told to submit a written explanation as to the charges forwarded. Being dissatisfied with the explanation, DW1 informed the plaintiff that his services would be terminated as he was found guilty of the first three charges and given a warning pertaining to the last two.

The plaintiff contended justness of the dismissal on the following grounds.

Firstly, that he had been denied a reasonable opportunity of being heard under the *audi alterem partem rule* when his request to examine and statements in the possession of the defendants, and to cross-examine witnesses had been denied.

Secondly, he submitted that the 1st defendant had acted mechanically in dismissing the plaintiff by virtue of the fact that it was DW1 who had recommended his dismissal. He argued that such powers were vested in the 1st defendant and that this power had been abdicated to someone else.

Thirdly, he forwarded that the fact that he was up for an interview for a promotion. It was his opinion that he would have been not called to attend it if he did not have a clean record of service.

Fourthly, he argued that the 1st defendant had taken into account an extraneous matter to the charges in question, namely, the outcome of a disciplinary proceedings held in 1981. He advocated the fact that he had no inkling nor given any indication that the 1981 proceedings had been taken into account against him. He added that as this fact was not stated in his show cause letter, this tantamount to not giving him the opportunity to comment or make representation regarding the matter.

And lastly, he argued that he had been denied the right to be heard in mitigation before the punishment was imposed.

The plaintiff sought the discretion of this court to firstly declare his dismissal null and void, secondly an inquiry to determine the salaries, emoluments and other benefits due to him, thirdly, damages and lastly, costs.

Held:

[1] Where disciplinary proceedings are taken against a person, those proceedings and the procedure to be adopted thereat are very often regulated by statute, and to that extent, the right to be heard may be regulated by the statute itself.

[2] General Order 26 provides that where the 1st defendant decides that the case against the plaintiff requires further clarification, a committee of inquiry would be set up in accordance with the relevant provisions of the 1980 General Orders, and it is only when these provisions come into play would the plaintiff have the right to examine witnesses and documents as well as being represented by counsel. Until then, the 1980 General Orders accord the plaintiff no such right.

[2a] The plaintiff's contention on procedural unfairness was without merit. There was no evidence before this court that the 1st defendant had found that the case against the plaintiff to require further clarification so as to bring the provisions of General Order 25, in particular sub-rule (5), into play.

[3] There was no evidence to show that the 1st defendant had acted mechanically by abdicating his power and discretion to DW1. The order contemplates two types of punishment, *ie*, dismissal or reduction in rank. DW1, by opting for the former, had merely recommended the preferred course of action.

[4] The real purpose behind the plaintiff's second submission purported to question the decision of the disciplinary authority and not the decision-making process. This court will not concern itself with the decision itself but with the decision-making process. As such, there was no merit in the said submission.

[5] There was no necessity for the plaintiff to be given the necessity to be heard in mitigation as a separate exercise before the imposition of punishment. The words in the show cause letter dated 7 January had communicated, in no uncertain terms, the contemplated punishment to be imposed on him.

[6] Where a disciplinary authority has taken into account matters which were never made known to the person affected by such issues so as to give him an opportunity to comment on it, or to controvert it, such failure would not be regarded as a pure technicality. It would constitute a breach of a fundamental right, namely, that of the right to be heard.

[6a] When the show cause letter dated 7 January did not advert to the fact of the 1981 disciplinary proceedings, there can be no question that the plaintiff had no inkling that such proceedings had or would be taken into consideration against him so that he could make representations against it.

[6b] The plaintiff had been denied of the opportunity to being heard which General Order 23 so clearly contemplated he had a right to and which art. 135(2) of the Federal Constitution confers on him.

[Unfair dismissal. Plaintiff granted relief sought.]

Case(s) referred to:
Abd Raub v. The AG [1983] MLJ 10 ***(refd)***
Ghazi Mohd Sawi v. Haniff Omar, Ketua Polis Negara, Malaysia & Anor [1994] 2 CLJ 333 ***(refd)***

Inspector-General of Police & Anor v. Alan Noor Kamat [1988] 1 MLJ 260 ***(foll)***
Lloyd v. McMahon & Anor [1987] AC 655 ***(refd)***
Shamsiah Ahmad Shah v. Public Services Commission, Malaysia [1991] 1 CLJ 23 ***(refd)***
Utrabadi Perumal v. Lembaga Tatatertib Perkhidmatan Awam & Anor [1998] 2 CLJ 306 ***(not foll)***

Legislation referred to:
Federal Constitution, art. 135(2)
Public Officers (Conduct and Discipline) General Orders (Cap 'D') 1980, General Orders 23, 26(5), (6), (7), (8)

For the plaintiff - Aris Rizal Christopher Fernando; M/s Aris Rizal Christopher Fernando & Co
For the defendants - Azamuddin Abdul Aziz; Federal Counsel

Reported by Maheswaran

JUDGMENT

Clement Skinner JC:

This suit is brought by the plaintiff who was before his dismissal, an Inspector in the Royal Malaysian Police. On 7 January 1993, the plaintiff received a letter signed by the Penolong Ketua Urusetia KPN (Tatatertib), on behalf of the Inspector-General of Police (the 1st defendant), informing the plaintiff that the 1st defendant, acting pursuant to the powers delegated to him by the Police Force Commission, had decided to take disciplinary action against the plaintiff under General Order 26 of the Public Officers (Conduct and Discipline) General Orders (Cap. 'D') 1980 (the 1980 General Orders). Representation had been made to the 1st defendant in respect of the plaintiff's unsatisfactory work and misconduct which in the 1st defendant's opinion merited dismissal. The plaintiff was accordingly informed of the 1st defendant's intention to dismiss him on the grounds contained in five charges set out in the letter of 7 January 1993, which reads as follows:

> **Tindakan Tatatertib**
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> Adalah saya diarah memaklumkan bahawa Y Bhg Ketua Polis Negara, pada menjalankan Kuasa-Kuasa yang telah diwakilkan kepadanya oleh Suruhanjaya Pasukan Polis melalui PU(B) 621 bertarikh 19 Disember 1985, telah memutuskan untuk mengambil tindakan tatatertib terhadap anda di bawah Perintah Am 26, Perintah Am Pegawai-Pegawai Awam (Kelakuan dan Tatatertib) (Bab 'D') 1980. Representasi telah dibuat kepada Y Bhg Ketua Polis Negara di atas kerja yang tidak memuaskan dan salah laku anda. Beliau berpendapat bahawa kerja yang tidak memuaskan dan salah laku tersebut wajar dikenakan hukuman 'BUANG KERJA'. Dengan yang demikian, Y Bhg Ketua Polis Negara bercadang untuk membuang kerja anda atas alasan-alasan berikut:

1.1 Alasan Pertama

Bahawa anda, seorang Pegawai Awam, iaitu Inspektor di dalam Pasukan Polis Diraja Malaysia dan ketika itu berkhidmat sebagai Inspektor Pembangunan di KDN/KA, Bukit Aman, dalam Wilayah Persekutuan, Kuala Lumpur, telah didapati tidak bertanggungjawab kerana anda telah tidak mengambil tindakan undang-undang ke atas KHOR CHENG ENG & TAN LOH (KP: 3628346) bersabit kegiatan perjudian empat ekor haram yang dijalankan olehnya di sekitar bandaraya Kuala Lumpur dan beberapa kawasan tertentu di Negeri Selangor, mulai tempoh 10 OKT. 90 hingga 9 NOV 90 dan oleh yang demikian, anda telah melakukan satu kesalahan tatatertib di bawah Perintah Am 4(2)(g), Perintah Am Pegawai-Pegawai Awam (Kelakuan dan Tatatertib) (Bab 'D'), 1980.

1.2 Alasan Kedua

Bahawa anda, seorang Pegawai Awam, iaitu Inspektor di dalam Pasukan Polis Diraja Malaysia dan ketika itu berkhidmat sebagai Inspektor Pembangunan di KDN/KA, Bukit Aman, dalam Wilayah Persekutuan, Kuala Lumpur, telah didapati tidak bertanggungjawab kerana anda telah tidak melaporkan kepada Pegawai atasan anda mengenai kegiatan perjudian empat ekor haram yang dijalankan oleh KHOR CHENG ENG @ TAN LOH (KP: 3628346) di sekitar bandaraya Kuala Lumpur dan beberapa Kawasan Tertentu di negeri Selangor mulai tempoh 19 OKT 90 hingga 9 NOV. 90 dan oleh yang demikian, anda telah melakukan satu kesalahan tatatertib dibawah Perintah Am 4(2)(g), Perintah AM Pegawai-Pegawai Awam (Kelakuan dan Tatatertib) (Bab 'D'), 1980.

1.3 Alasan Ketiga

Bahawa anda, seorang Pegawai Awam, iaitu Inspektor di dalam Pasukan Polis Diraja Malaysia dan Ketika itu berkhidmat sebagai Inspektor Pembangunan di KDN/KA, Bukit Aman, dalam Wilayah Persekutuan, Kuala Lumpur, telah didapati berkelakuan yang dianggap sebagai membiarkan kepentingan persendirian anda bercanggah dengan kewajipan-kewajipan awam anda, iaitu anda telah menjalin perhubungan yang erat dengan KHOR CHENG ENG @ TAN LOH (KP: 3628346), mulal tempoh 19 OKT 90 hingga 9 NOV 90 dengan mengetahui bahawa beliau adalah seorang penganjur kegiatan perjudian empat ekor haram yang bergiat di sekitar bandaraya Kuala Lumpur dan beberapa kawasan tertentu di negeri Selangor sehingga menjejaskan kegunaan anda sebagai seorang Pegawai Kanan Polis yang di pertanggungjawabkan dengan tugas memelihara undang-undang, menangkap dan mendakwa pesalah-pesalah seperti kehendak Seksyen 3(3) Akta Polis 1967 dan oleh yang demikian, anda telah melakukan satu kesalahan tatatertib di bawah Perintah Am 4(2)(c)(i), Perintah Am Pegawai-Pegawai Awam (Kelakuan dan Tatatertib) (Bab 'D'), 1980.

1.4 Alasan Keempat

Bahawa anda, seorang Pegawai Awam, iaitu Inspektor di dalam pasukan Polis Diraja Malaysia dan ketika itu berkhidmat sebagai Inspektor Pembangunan di KDN/KA, Bukit Aman, dalam Wilayah Persekutuan, Kuala Lumpur, telah didapati ingkar perintah kerana tidak mencatatkan butir-butir pergerakan anda dan tempat yang dilawati dengan lengkap di dalam Perharian Rasmi anda bagi tarikh 6 OGOS 90, yang mana perbuatan tersebut adalah bertentangan dengan Peraturan HTKPN A121 Para 9 dan oleh yang demikian, anda telah melakukan satu kesalahan tatatertib di-bawah Perintah Am 4(2)(1), Perintah Am Pegawai-Pegawai Awam, (Kelakuan dan Tatatertib) (Bab 'D'), 1980.

1.5 Alasan Kelima

Bahawa anda, seorang Pegawai Awam, iaitu Inspektor di dalam Pasukan Polis Diraja Malaysia dan Ketika itu berkhidmat sebagai Inspektor Pembangunan di KDN/KA, Bukit Aman, dalam Wilayah Persekutuan, Kuala Lumpur, telah didapati ingkar Perintah kerana tidak mengemukakan Perharian Rasmi anda bagi bulan JAN 92 hingga MEI 92 untuk diperiksa oleh Pegawai atasan anda, yang mana perbuatan tersebut adalah bertentangan dengan kehendak HTKPN A121 Para 8 dan oleh yang demikian, anda telah melakukan satu kesalahan tatatertib di bawah Perintah Am 4(2)(i), Perintah Am Pegawai-Pegawai Awam (Kelakuan dan Tatatertib) (Bab 'D'), 1980.

The plaintiff was requested to show cause in writing within 16 days of the receipt of that letter why he should not be dismissed. It was indicated in that letter that if no representation was received within the time specified, the 1st defendant would proceed to consider taking further action to dismiss the plaintiff on the evidence available to him.

On 27 January 1993, the plaintiff sent in his written representation in an attempt to exculpate himself. The plaintiff denied the charges and stated his reasons for doing so. The plaintiff ended the penultimate paragraph of his representation by stating that, "Sekiranya penjelasan bertulis saya masih meragui Yang Berbahagia, saya memohon dibenarkan memeriksa dan soal balas segala keterangan yang dikemukakan dalam representasi kepada Yang Berbahagia." In other words, the plaintiff indicated that if his written representation was unsatisfactory to the 1st defendant, he wished to be permitted to examine the evidence and cross-examine witnesses.

On 3 April 1993, the plaintiff received a letter, signed by Hj. Ahmad Ragib bin Hj. Mohd. Salleh, Penolong Ketua Urusetia KPN (Tatatertib) on behalf of the 1st defendant informing the plaintiff that after considering his written representation, the 1st defendant was of the opinion that the plaintiff had failed to exculpate himself to the satisfaction of the 1st defendant and in exercise

of the powers vested in him as the disciplinary authority, the 1st defendant had decided that in respect of each of the 1st, 2nd and 3rd charges, the plaintiff be dismissed from service. In respect of the 4th and 5th charges, the plaintiff was given a warning.

Dissatisfied with the decision of the 1st defendant, the plaintiff commenced these proceedings and sought the following relief;

(a) A declaration that his dismissal is unlawful, unconstitutional, void and of no effect and that he is still an Inspector of Police, entitled to all the salary, emoluments and benefits due as such inspector.

(b) An inquiry to determine the salaries, emoluments and other benefits, due to him.

(c) Damages.

(d) Costs.

At the trial of this action, the plaintiff gave evidence. He maintained that in so far as the 1st, 2nd and 3rd charges are concerned they are false. All three charges relate to a person called Khor Cheng Eng (Khor) who was reputedly an illegal 4-Digit lottery operator. It is the plaintiff's case that he did not even know Khor so it is not possible to report or take action against or associate with someone whom you do not know. As regards the 4th and 5th charges which relate to the plaintiff failing to make entries in his police diary of his movements on 6 August 1990 and failing to submit his diary for inspection between January to May 1992 respectively, the plaintiff explained that he had for the past 13 years been entering his diary in the same manner. His diary had been submitted to his superior for inspection at the beginning of every month and no objection had been raised thereto, including that for 6 August 1990. As to why he had not sent in his diary for inspection between January to May 1992, the plaintiff maintained that he was on leave on 27 January 1992 after which he attended a police field force training course between 9 February 1992 till 4 June 1992. During the course he was not required to send his diary for inspection by the training officer. This was the same for all other officers attending the course.

The plaintiff also testified that he had asked to examine the evidence against him and be allowed to cross-examine witnesses but his request had been refused. He wanted to confront and see whom it was that made those allegations. Without any documents, letters or statements, he was not able to exculpate himself any further than what was stated in his written representation. The plaintiff stated that had he been afforded an opportunity to cross-examine the witnesses or been given documents or statements, he would have been able

to prove that the allegations against him were baseless and false. The plaintiff also gave evidence that prior to the show cause letter being issued to him, he had been invited to attend an interview for purposes of promotion in the service. According to the plaintiff, and this is confirmed by DW1, for an officer to be invited for such an interview, he must have a clean record for the three years immediately proceeding the interview.

The plaintiff also called as his witness Khor Cheng Eng. Khor testified that he did not know the plaintiff at all. Khor admitted in testimony that he had on two previous occasions been detained and placed under restricted residence for operating an illegal 4-Digit lottery.

The defendants called as a witness Dato Hj. Ahmad Ragib bin Hj. Mohd. Salleh (DW1) who was at the material time the Penolong Ketua Urusetia KPN (Tatatertib). It was DW1 who submitted the representation to the 1st defendant recommending that General Order 26 be applied against the plaintiff. In the course of his cross-examination, DW1 was shown a document (P4) relating to previous disciplinary proceedings taken against the plaintiff in 1981 (the 1981 disciplinary proceedings) and which counsel for the defendants had shown to the plaintiff during his cross-examination. DW1 stated that he was aware of the 1981 disciplinary proceedings against the plaintiff as it was relevant to the investigation into the conduct of the plaintiff and formed part of the report submitted to the 1st defendant. When DW1 was asked by defence counsel if all matters in the report including the 1981 disciplinary proceedings had been taken into account in submitting the recommendation to the 1st defendant, DW1 replied "yes'.

The defence also called as a witness Mohd. Hj. Abdullah (DW2) who acted as investigating officer in respect of the charges brought against the plaintiff.

DW2 testified that as a result of intelligence gathered by him, a raid was conducted on 1st December 1990 at six places around Kuala Lumpur and Selangor on illegal 4-Digit lottery operations carried out by Khor Cheng Eng. Of the six raids carried out, one was succesfull where 17 persons were arrested. Khor Cheng Eng and four members of his syndicate were also arrested. Statements were taken from those arrested as well as from four police officers, including the plaintiff. According to DW2, the investigation showed that the plaintiff was involved in giving protection to and associating with Khor Cheng Eng.

In his closing submissions, Mr. Christopher Fernando of counsel for the plaintiff submitted that:

(a) as the plaintiff's request to examine documents and statements in the possession of the defendants and to cross-examine witnesses had been

refused, the plaintiff had been denied a reasonable opportunity of being heard under the *audi alteram partem rule*. He had not been afforded the facilities with which to put up a meaningful and complete reply to exculpate himself. Accordingly, the plaintiff's dismissal was in violation of the rules of natural justice and in contravention of art. 135(2) of the Federal Constitution;

(b) it was DW1 who recommended that (i) disciplinary action be instituted against the plaintiff and (ii) that the plaintiff be dismissed as well. It was submitted that since such powers were vested only in the 1st defendant, the 1st defendant had acted mechanically in dismissing the plaintiff. In so doing the 1st defendant had abdicated his power and discretion to someone else;

(c) the evidence produced in court showed that the plaintiff and Khor did not know each other. It is therefore evident that the first three charges against the plaintiff were patently false. If the plaintiff had been afforded the opportunity to cross-examine the witnesses, it would have been shown that these three charges could not stand. Counsel also submitted that the falsity of the charges was demonstrated by the fact that the plaintiff had been invited to attend an interview for promotion before the show cause letter was issued to him. Given the fact that to be invited for such an interview the plaintiff had to have a clean record in the three years immediately preceding the interview, if there was any substance to the charges, the plaintiff would not have been invited for the interview.

(d) in dismissing the plaintiff, the 1st defendant had taken into account a matter extraneous to the five charges, namely, the 1981 disciplinary proceedings, without giving the plaintiff an opportunity to comment or make representation regarding that matter. It was counsel's submission that as the disciplinary proceedings were not adverted to in the show cause letter, the plaintiff had no inkling when he submitted his representation that the 1981 proceedings was going to be taken into account against him. The case of *Shamsiah bte Ahmad Shah v. Public Service Commission* Malaysia [1991] 1 CLJ 23 FC was cited in support.

(e) the plaintiff had been denied a right to be heard in mitigation against the punishment meted out to him. As dismissal constituted the most severe form of punishment that could be imposed on the plaintiff, he had a right to be heard in mitigation before such punishment was imposed. It was the submission of counsel that as the imposition of a punishment itself involved a decision making process, the plaintiff should have been afforded an opportunity to be heard in mitigation. The case of *Utrabadi Perumal v. Lembaga Tatatertib Perkhidmatan Awam & Anor* [1998] 3 MLJ 676 was cited in support.

The above submissions reveal that the plaintiff's main complaint is that in dismissing him, the 1st defendant had been guilty of procedural impropriety. Except from the submission in para (b) above, all the submissions of counsel for the plaintiff raised in one way or another the same question: where a party had a right to be heard, to what extent does such right lie? Is he entitled to examine evidence and call on the disciplinary authority to provide him with copies of documents and statements used in the investigation against him? Is he entitled to cross-examine witnesses? Is he entitled to be heard in mitigation before any punishment is imposed on him? It is evident from the submissions of Mr Fernando that he regards the right to be heard as encompassing all the above rights.

In my judgment, that question is best answered by identifying the context in which the right to be heard arises because while the rules of natural justice have their origins in the common law, in instances such as this, where disciplinary proceedings are taken against a person, those proceedings and the procedure to be adopted thereat are very often regulated by statute, and to that extent, the right to be heard may be regulated by the statute itself. That a statute may regulate or circumscribe the extent of a right to be heard was recognised by the Supreme Court in the case of *Ghazi bin Mohd Sawi v. Haniff bin Omar, Ketua Polis Negara, Malaysia & Anor* [1994] 2 CLJ 333.

In that case, the appellant police inspector was subject to disciplinary proceedings pursuant to O. 23 and 26 of the 1980 General Orders. He was asked to show cause in writing why he should not be dismissed after it was represented to the disciplinary authority that he was guilty of eight charges of unsatisfactory work or misconduct. The appellant did show cause and denied the charges but was nevertheless dismissed by the disciplinary authority without being afforded an oral hearing. On appeal, the Supreme Court had to consider a submission that there was a breach of natural justice when the appellant was not afforded an oral hearing or the right to be represented by a lawyer considering the fact that dismissal was a serious matter which affected the appellant's livelihood.

In answering that question, the Supreme Court examined the relevant provisions of Chapter 'D' of the 1980 General Orders and reviewed the procedure adopted by the disciplinary authority and came to the conclusion that the only provision in Chapter 'D' that afforded the appellant the right to an oral hearing was General Order 26(5) which stipulated that if the disciplinary authority considered that the case against the appellant required further clarification, a committee of inquiry was to be appointed whereat the appellant would be entitled to be legally represented. The Supreme Court held that since the disciplinary authority had not found it necessary to proceed under General Order 26(5), no such right had arisen in favour of the appellant.

In support of the approach the court took, that is, of starting with an examination of the provisions of the 1980 General Orders to determine the extent of the right of the appellant to be heard, His Lordship Jemuri Serjan CJ (Borneo) referred to the following passage of the judgment of Lord Bridge of Harwich in *Lloyd v. McMahon & Anor* [1987] AC 655 at p. 702 which reads:

> My Lords, the so-called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates. In particular, it is well established that when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguard as will ensure the attainment of fairness. It follows that the starting-point for the examination of all the appellants' submissions on this aspect of the case is the Act of 1982 ...

His Lordship Jemuri Serjan then went on to caution that in the context of a proceeding under chapter 'D' of the 1980 General Orders, the court is to guard against adding words into the orders which were never intended. This is what His Lordship stated at p. 131:

> In dealing with Ch. D of the 1980 General Orders we remind ourselves that we are dealing with General Orders that have legislative effect and we must guard ourselves against adding words into them which were never intended. In this regard, we found support in the passage of judgment of Barwick CJ in *Twist v. Randwick Municipal Council* at page 100:
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> > ... if the legislation has made provision for that opportunity to (be heard) to be given to the subject before his person or property is so affected, the court will not be warranted in supplementing the legislation, even if the legislative provision is not as full and complete as the court might think appropriate. Thus, if the legislature has addressed itself to the question whether an opportunity should be afforded the citizen to be relevantly heard and has either made it clear that no such opportunity is to be given or has, by its legislation, decided what opportunity should be afforded, the court being bound by the legislation as much as is the citizen, has no warrant to vary the legislative scheme.

Reverting to the facts of our case it is pertinent to note that the general orders which governed the bringing of disciplinary proceedings against the appellant in the case of *Ghazi bin Mohd Sawi*, and the plaintiff here are both the same, namely the Public Officers (Conduct and Discipline) General Orders (Cap. 'D') 1980.

A reading of General Order 26 shows that it is only if the 1st defendant had decided that the case against the plaintiff required further clarification that a committee of inquiry would be set up according to the provisions of sub-order (5) whereafter the provisions of sub-order (6), sub-order (7) and sub-order (8) of General Order 26 would come into play thereby giving to the plaintiff a right to examine witnesses and documents as well as being represented by counsel. Until then, the 1980 General Orders accord the plaintiff no such right. And, there was no evidence before the court in this case that the 1st defendant had found that the case against the plaintiff required further clarification so as to bring the provisions of General Order 26(5) into play. I accordingly find no merit in the submission that there had been procedural unfairness when the 1st defendant refused to accede to the plaintiff's request that he be permitted to examine evidence and to cross-examine witnesses.

With regard to the submission that the 1st defendant had acted mechanically as he had abdicated his power and discretion to DW1, I find that submission unsupported by any evidence before the court. In fact the testimony of DW1 on this point is that he only recommended to the 1st defendant that General Order 26 should be applied against the plaintiff. The order contemplates two types of punishment – dismissal or reduction in rank. The fact that the 1st defendant was of the opinion that the plaintiff's misconduct warranted dismissal instead of demotion shows that he did not act mechanically or that he had abdicated his powers to DW1 as alleged. I accordingly reject this submission.

With reference to the submission that the charges laid against the plaintiff were patently false and that such falsity is demonstrated by the fact that if there had been any substance to the charges, the plaintiff would not have been invited for an interview with a view to promotion, I again find no merit in this submission. The submission purports to show that the disciplinary authority had acted on false evidence. As such, its real purpose is to question the decision of the disciplinary authority and not the decision-making process. The short answer to such a complaint is that in proceeding brought to review the decision of an inferior tribunal or disciplinary authority, whether by way of judicial review or an action for a declaration, the court will not concern itself with the decision itself but with the decision-making process. (See *Abd Raub v. The AG* [1983] MLJ 10). This is not a case in which the plaintiff seeks to impugn the decision of the 1st defendant as being unreasonable on *"Wednesbury"* principles.

I next consider whether the plaintiff had a right to be heard in mitigation as a separate exercise before the imposition of a punishment on him in the context of the 1980 General Orders. The answer to this question has been authoritatively stated in the case of *Inspector-General of Police & Anor v. Alan Noor bin Kamat* [1988] 1 MLJ 260 – where it was held that there is no

necessity to give an officer another opportunity to be heard in mitigation in respect of the punishment to be imposed on him if the show cause letter had indicated the proposed punishment. At p. 262 of its judgment this was what the Federal Court stated:

> ... If however, the show cause letter had included the proposed punishment, for example by the inclusion of such statement as 'the proceeding is taken against you with a view to dismissal or reduction in rank' or 'this proceeding is taken under G.O.D. 30 with a view to dismissal or reduction in rank' or such other phraseology as would give the effect of making the respondent understand the nature of the proceeding, and what they would lead to, there is no necessity for the appellants to give another opportunity of being heard before the punishment is imposed.

Counsel for the plaintiff relies instead on the case of *Utrabadi Perumal v. Lembaga Tatatertib Perkhidmatan Awam & Anor* in support of his submission that the plaintiff had a right to be heard in mitigation as a separate exercise before the imposition of a punishment on him. With respect, I decline to follow that decision for the reason that the learned judge there had decided that the decision of the Federal Court in the case of *Inspector-General of Police & Anor v. Alan Noor bin Kamat* on this particular point was purely *obiter dicta*. To me, what was said by the Federal Court in *Alan Noor's* case about an opportunity being afforded to an officer to be heard in mitigation was not *obiter dicta* but *ratio decidendi* on the particular point under consideration.

Reverting to the facts of our case, the letter of 7 January 1993 sent to the plaintiff stated " ... wajar dikenakan hukuman buang kerja." There were accordingly, words in the letter of 7 January 1993 that conveyed to the plaintiff in no uncertain terms the contemplated punishment to be imposed on him. With such clear phraseology, there was in my view no necessity for the plaintiff to be given another opportunity of being heard.

I finally consider the submission that the 1st defendant had taken into account extraneous matters, namely, the 1981 disciplinary proceedings against the plaintiff without giving him an opportunity to make representation regarding that matter.

To begin with, the defence did not attempt to controvert or clarify the admission made by DW1 in his cross-examination that the 1981 disciplinary proceedings formed part of the report submitted to the 1st defendant and that all matters in the report, including the 1981 disciplinary proceedings, was taken into account in submitting the recommendation to the 1st defendant.

What this uncontroverted evidence establishes is that firstly, when DW1 recommended to the 1st defendant that General Order 26 be applied against the plaintiff, that recommendation had taken into account the 1981 disciplinary proceedings and secondly, when the 1st defendant, as the disciplinary authority, formed an initial view that there was a *prima facie* case for the dismissal of the plaintiff so that he (the plaintiff) should be asked to show cause, that decision must necessary have been based on the materials placed before the 1st defendant, namely, the recommendation of the DW1 and the contents of the report submitted to him, both of which took into account the 1981 disciplinary proceedings. There can be no question then that when the show cause letter of 7 January 1993 did not advert to the fact of the 1981 disciplinary proceedings, the plaintiff had no inkling that it had or would be taken into consideration against him so that he could make representation against it. In having failed to afford the plaintiff such opportunity, I am constrained to hold that the plaintiff had been denied of that opportunity to being heard which General Order 23 so clearly contemplated he had a right to and which art. 135(2) of the Federal Constitution confers on him.

The authorities on this area of the law show that where a disciplinary authority has taken into account matters which was never made known to the person affected by such matters so as to give him an opportunity to comment on it, or to controvert it, such failure was not to be regarded as a pure technicality; it constituted the breach of a fundamental right, namely, that of the right to be heard. In *Shamsiah bte Ahmad Shah v. Public Service Commission Malaysia* [1990] 3 MLJ 364, the appellant there was dismissed from service as a book-binder with the government printing department on the grounds of negligence and dereliction of duty. In arriving at its decision the disciplinary authority there took into account the appellant's record of past conduct without giving her an opportunity to explain or to controvert its contents. On appeal the Supreme Court found that in not having afforded her the opportunity, the respondent had infringed the rules of natural justice. In so holding this is what Jemuri Serjan SCJ (as he was then) said at p. 367;

> The case of the appellant's complaint in regard to the breach of the rules of natural justice was the fact that the first respondent, in arriving at its decision to dismiss her from service, took into account extraneous matter, namely the appellant's record of past conduct which were entered in her record of service and produced by the Director-General of the Government Printers Department, Kuala Lumpur to the first respondent without giving her an opportunity to explain, contradict or rebut them.

His Lordship went on to say at p. 387:

> What we are saying is that if these materials which have such damning effect on her case are to be used against her she should be given a right to be heard on them. It is not a matter of pure technicality but it is absolutely fundamental in law that the appellant should have been given an opportunity of stating her case regarding her past conduct, considering that the dismissal of a civil servant is no light matter.

In the circumstances, I find that on this ground, the plaintiff is entitled to the relief he seeks. There will accordingly be judgment for the plaintiff in terms of the orders he seeks in prayers (i), (ii) and (iv) of his claim.